No. 15918

In the

United States Court of Appeals

For the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, *Appellant,*

vs.

JOHN LYLE MONTGOMERY, *Appellee.*

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

Honorable GUS J. SOLOMON, *District Judge*

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ARGUMENT

Specification of Error No. 1

1. Appellee suggests (Br 2) that appellant has misrepresented the nature and seriousness of Mrs. Montgomery's condition when she was taken to Holladay Park Hospital the first time. The statement in appellant's brief (Br 6) is drawn from the record: it is entirely correct, and there is nothing in the portions of

the record cited by appellee contradicting or qualifying it in any way.[1] Counsel's concern is a revealing comment on his case.

2. Appellee apparently believes (Br 3-4) that state law controls the question whether there is sufficient evidence to raise a question for the jury. This is incorrect.

> ". . . The question of whether the evidence makes an issue for a jury is one to be determined by the federal courts by their own processes of reasoning and conclusion, and not according to any rule or standard which may be fixed for doing it by statutes or decisions of a state."
>
> (*New York Life Ins. Co. v. Sparkman*, 101 F2d 484 at p. 485 (CCA 5 1939))

See also: *Ling v. Edenfield*, 211 F2d 705 at p. 708 (CA 5 1954); *Reid v. Nelson*, 154 F2d 724 (CCA 5 1946); 14 Cyc Fed Proc (3 ed 1952) 211-212 (§ 67.31).

The issue under federal law is whether there is substantial evidence from which reasonable men might find the material, controverted issues in favor of the plaintiff (14 Cyc Fed Proc (3 ed 1952) 213 (§ 67.31)). In the present case, the admitted and uncontradicted facts demonstrate that appellant was entitled to judgment as a matter of law.

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1. Appellee's reference to page 155 of the record refers in fact to a different and later trip to the hospital.

3. *Appellee has wholly failed to refute appellant's charge (Br 18-19, 25-26) that the deceased wilfully failed to disclose her prior medical history as required by the policy application.* Questions 10 (d) and (e) of Part 2 (Declaration to Medical Examiner) requested information respecting ailments and diseases not included in previous answers. They *expressly requested* the "name and address of *every* physician consulted" (emphasis supplied).[2] In answering the question, the deceased specifically mentioned her alleged "nervousness"; yet the only physician disclosed therein is "Dr. Joe Cooney" (R 230). She failed to mention that she had been extensively treated by two psychiatrists, Dr. Dickel or Dr. Coen, who were actually in charge of her case.

The foregoing facts are admitted. They are decisive of the present appeal under the Oregon authorities referred to in appellant's brief. There was no conflict of evidence with respect to them, and appellant was entitled to judgment as a matter of law.

4. The allegation in appellee's brief (Br 5) that Mrs. Montgomery

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2. Question 10 (d) is not, as suggested by appellee (Br 7), "basically . . . the same" as Question 29 of Part 1. In answering Part 1, the deceased's "nervousness" had been mentioned in answer to an earlier question (Question 28) which requested *only the name of the attending physician.* Question 29 was answered "No" (R 227). Appellee's elaborate contention that Dr. Cooney was Mrs. Montgomery's "attending physician" (Br 6-7) is wholly beside the point.

> "had not had, had not been told she had, nor had been treated for any of the conditions noted in 27 (e) with the exception of nervousness"

is not supported by his reference to the record (R 161).

5. Appellee still insists (Br 7), despite his repeated and express waiver of any claim based on waiver or notice, that appellant was on notice of the true facts by reason of Dr. Lee's extraneous knowledge of the deceased's hospitalization. Nothing could illustrate more graphically the prejudice to appellant caused by the improper admission of Dr. McGee's testimony (Second Specification of Error, Br 28-31). It reveals exactly why the evidence was offered, free from pious references to Dr. McGee's alleged "interpretation" of the questions in the policy application.

6. a) Appellee's discussion of the menopausal origin of Mrs. Montgomery's condition (Br 8-9) does not relate to the truth or falsity of her answers, *but only to their materiality*. This question, however, has already been decided adversely to appellee by the very jury on whose verdict he relies. *The jury has expressly found that the answers on the application were material.*

b) Further, the suggestion that her condition was common in women approaching the menopause is

demonstrably incorrect. The deceased was taken to the hospital by ambulance in an irrational condition and during the course of extensive hospitalization was given five shock treatments. How could this or any jury conclude that this was a "common" condition?

c) *Finally, appellee wholly ignores and fails to contradict appellant's contention that these were additional facts relating to her medical history within the scope of Question 33 (Part 1), which the insured was thereby obligated to disclose and which appellee, himself a doctor, must have known were material* (Br 27-28).

As quoted (in part) by appellee himself (Br 11):

". . . In this case there is no dispute and the court also found that the assured did, indeed, consult other physicians and was treated by them and that information was withheld from the company. Under such a state of facts the very great weight of well-considered cases is to the effect that it amounts to legal fraud, vitiating the policy. To hold otherwise would take from any party considering an offer the right to accept or reject the same, and this too at the behest of the other party, although the latter had stifled investigation by the concealment of matters which would naturally challenge the consideration of the other. . . ."

(*Mutual Life Insurance Company v. Chandler*, 120 Or 694 at p. 701, 252 Pac 559 (1927))

The record is conclusive that the deceased and her doctor-husband, appellee, wilfully withheld information which related to her medical history and was material to the risk. They were guilty of legal fraud as a matter of law, and appellant was entitled to judgment.

SPECIFICATION OF ERROR NO. 2

1. While the record shows that Dr. McGee knew Mrs. Montgomery had been in Holladay Park Hospital (Br 17), *there is nothing in the record suggesting that he knew that Dr. Dickel and Dr. Coen had attended her. Consequently, there was no possible basis upon which he could "interpret" the question to require only Dr. Cooney's name. The asserted basis of admissibility was completely lacking.*[3]

2. Furthermore, Dr. McGee could not "interpret" the question when he had only second-hand information and knew nothing of her actual condition (R 135, 138). The court's entire theory of admissibility ultimately depended upon proof that Dr. McGee had first-hand knowledge of the facts which would make the doctor's conclusion (or "interpretation") helpful to the jury.

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3. The question (10 d, e) did not seek the name merely of the "attending physician." It requested the name of *every* physician consulted. Appellee's assertion to the contrary (Br 17) and Dr. McGee's confusion (R 147) demonstrate that appellee's case rests on a misconception of the facts. His contention does not go to the fraud which is charged.

Since there is no claim of waiver or notice, appellant could not be bound or prejudiced by his interpretation of what the applicant or someone else might tell him. The testimony was inadmissible and highly prejudicial.

3. Appellee is incorrect in suggesting (Br 5) that Dr. McGee did not ask and receive answers to all of the questions on the application when he interviewed Mrs. Montgomery. In fact, he testified that she answered every question which he asked and that "*every question was answered.*" (R 136)

CONCLUSION

The evidence is conclusive that the policy was issued as a result of legal fraud of the deceased and her doctor-husband, appellee, and that appellant was entitled to and did rescind it.

It is equally clear that prejudicial error was committed by the trial court in the admission of testimony.

It follows that the judgment of the trial court should be reversed and entry of judgment directed in favor of appellant. If the Court should disagree with appellant in this regard, it should nonetheless allow appellant a new trial.

Respectfully submitted,

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